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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

SOLOMON AFLALO, Plaintiff and Appellant, v. COMMUNITY BANK OF THE BAY, Defendant and Respondent.	B281850 (Los Angeles County Super. Ct. No. BC527072)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert L. Hess, Judge. Affirmed.

Richards, Watson & Gershon and T. Peter Pierce; Ivie, McNeill & Wyatt and Rickey Ivie for Plaintiff and Appellant.

Rutan & Tucker, Ira G. Rivin and Justine L. Kastan for Defendant and Respondent.

Plaintiff and appellant Solomon Aflalo (plaintiff) appeals from the summary judgment entered in favor of defendant and respondent Community Bank of the Bay (CBB) in this wrongful foreclosure action. We affirm the judgment.

BACKGROUND

HRF's loan to plaintiff

In December 2008, HRF Mortgage (HRF) loaned plaintiff $425,000 (the Malibu Loan). The Malibu Loan was evidenced by a note (the Note), and secured by a deed of trust (Deed of Trust) encumbering plaintiff's residence in Malibu (the Malibu Property). The Note had a stated maturity date of January 1, 2014.

HRF's assignment to CBB

In May 2013, CBB extended a $1 million line of credit to HRF. The line of credit was secured by notes and deeds of trust within HRF's current mortgage collateral pool, including the Note and Deed of Trust, pursuant to a Commercial Security Agreement. As contemplated by the Commercial Security Agreement, HRF executed an assignment of deed of trust assigning the Deed of Trust to CBB. The assignment of deed of trust was recorded on June 11, 2013.

Between April 30, 2014 and June 25, 2014, HRF removed the Note from the collateral securing its indebtedness to CBB. Between May 15, 2013 and June 25, 2014, CBB never declared HRF in default under its line of credit.

HRF's foreclosure

Plaintiff ceased making payments on the Note in May 2012. In November 2013, HRF directed Fidelity National Title Company (Fidelity), the trustee under the Deed of Trust, to issue a notice of default, which was recorded on November 15, 2013. HRF did not seek CBB's permission or approval before instructing Fidelity to issue the notice of default.

HRF subsequently engaged Placer Foreclosure (Placer) as the successor trustee to Fidelity. At HRF's request, CBB, the then current beneficiary under the Deed of Trust, signed a substitution of trustee form that changed the trustee from Fidelity to Placer.[1]

On March 18, 2014, Joe Vanni (Vanni), the principal of HRF, executed a document authorizing Placer to begin foreclosure proceedings on the stated basis that the Note had matured and payments owed thereunder were delinquent. On March 28, 2014, Placer, at HRF's direction, recorded a notice of trustee's sale.

On May 21, 2014, HRF authorized Placer to make a full credit bid at the foreclosure sale in the amount of $376,492.19. The foreclosure sale took place on May 22, 2014, resulting in a sale of the Malibu Property to Pro Value Properties, Inc. HRF received some of the foreclosure proceeds as repayment of the Note. Other than in its capacity as a depository bank for HRF, CBB received none of the proceeds from the foreclosure sale.

The instant lawsuit

Plaintiff commenced this action in 2013 against HRF and several other defendants. The operative third amended complaint asserted six causes of action, including wrongful foreclosure. Plaintiff alleged that in January 2012, two years before the Note matured, HRF orally agreed to a discounted payoff of the Malibu Loan. According to plaintiff, HRF agreed to extend the maturity date of the Note and to reduce the amount owed under the Note as part of a refinancing transaction involving a separate $2 million loan HRF had made to an entity

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[1] In October 2013, CBB, at HRF's request and as the current beneficiary under the Deed of Trust, signed a substitution of trustee form that substituted Fidelity in place of Old Republic, the original trustee.

affiliated with plaintiff (the Tahoe Loan). The Tahoe Loan was secured by a deed of trust against real property plaintiff owned at 968 Park Avenue in South Lake Tahoe, California (the Tahoe Property). Plaintiff alleged that HRF agreed to accept the discounted amount of $2,300,000 as payment in full of the combined outstanding balances on both the Malibu Loan and the Tahoe Loan.

Plaintiff substituted CBB as a Doe defendant and subsequently dismissed all of the defendants except CBB. CBB filed a motion for summary judgment as to all of the causes of action asserted against it. Plaintiff opposed the motion only as to the cause of action for wrongful foreclosure.

The trial court granted the summary judgment motion, and judgment was entered in CBB's favor. This appeal followed.

DISCUSSION

I. Summary judgment: legal principles and standard of review

Summary judgment is granted when a moving party establishes the right to entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

A defendant moving for summary judgment bears the initial burden of proving that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038 (*Cucuzza*).) Once the defendant has made such a showing,

the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar, supra*, 25 Cal.4th at p. 849.) If the plaintiff does not make such a showing, summary judgment in favor of the defendant is appropriate. In order to obtain a summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action. . . . [T]he defendant need not himself conclusively negate any such element." (*Id.* at p. 853.)

On appeal from a summary judgment, an appellate court makes "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. [Citations.]" (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

II. Wrongful foreclosure

To prove the tort of wrongful foreclosure, a plaintiff must establish the following elements: "'"(1) [T]he trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale . . . was prejudiced or harmed; and (3) . . . the trustor or mortgagor tendered the amount of the indebtedness or was excused from tendering.'" [Citation.]" *Sciarratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th 552, 561-562.)

Plaintiff acknowledges that HRF, and not CBB, foreclosed on the Deed of Trust. He argues, however, that triable issues of material fact exist as to whether HRF was acting as CBB's agent during the foreclosure proceedings. Plaintiff further argues that triable issues exist as to whether HRF orally agreed to modify the terms of the Malibu Loan, thereby excusing plaintiff's

performance under the Note and Deed of Trust. As we discuss, there is no triable issue of material fact as to whether HRF was acting as CBB's agent, and the statute of frauds bars plaintiff's claim that an alleged oral agreement excused his nonperformance under the Note and Deed of Trust.

A. No triable issue as to agency

"Civil Code section 2295 defines an agent as 'one who represents another, called the principal, in dealings with third persons.' An agent acts on behalf of the principal and subject to the principal's control. [Citation.] "'In the absence of the essential characteristic of the right of control, there is no true agency . . . .'" [Citation.]" (*Korean Air Lines Co., Ltd. v. County of Los Angeles* (2008) 162 Cal.App.4th 552, 562.) "The existence of an agency relationship is usually a question of fact, unless the evidence is susceptible of but a single inference. [Citations.]" (*Violette v. Shoup* (1993) 16 Cal.App.4th 611, 619.)

Here, the undisputed evidence is susceptible of but a single inference -- that no agency relationship existed between HRF and CBB. The evidence showed that HRF declared plaintiff to be in default under the Note and authorized Fidelity to record a notice of default. HRF did not seek CBB's authorization or approval before instructing Fidelity to record the notice of default, which identifies HRF as the beneficiary. HRF did not seek CBB's authorization or approval before instructing Placer, as the successor trustee to Fidelity, to begin foreclosure proceedings, to issue a notice of sale, and to make a credit bid at the foreclosure sale. HRF received some of the foreclosure proceeds. CBB did not.

The evidence cited by plaintiff -- a provision in the Commercial Security Agreement prohibiting HRF from selling or assigning the Note and Deed of Trust and requiring HRF to hold the proceeds from such a sale in trust for CBB's benefit; CBB's

signature on the Fidelity and Placer substitution of trustee forms; language in the notice of default directing plaintiff to contact CBB to arrange for payment to stop foreclosure; and plaintiff's telephone conversations with Vanni regarding the foreclosure -- raises no reasonable inference that CBB controlled HRF in connection with the foreclosure proceedings.

That the Commercial Security Agreement prohibited HRF from selling, offering to sell, or otherwise transferring or disposing of the collateral securing its line of credit without obtaining CBB's prior written consent, and required HRF to hold all proceeds from any disposition of the collateral in trust for CBB,[2] did not preclude HRF from foreclosing under the Deed of Trust without CBB's consent. The Commercial Security Agreement expressly authorized HRF to do so, so long as HRF was not in default under the line of credit: "Until default, [HRF] may have . . . beneficial use of all the Collateral and may use it in any lawful manner not inconsistent with this Agreement." The Commercial Security Agreement did not require HRF to obtain CBB's prior written consent before foreclosing under the Deed of

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[2] The provision of the Commercial Security Agreement cited by plaintiff states: "Transactions Involving Collateral. Except for inventory sold or accounts collected in the ordinary course of Grantor's business, or as otherwise provided for in the Agreement, Grantor shall not sell, offer to sell, or otherwise transfer or dispose of the Collateral. Grantor shall not pledge, mortgage, encumber or otherwise permit the Collateral to be subject to any lien, security interest, encumbrance, or interests even if junior in right to the security interests granted under the Agreement. Unless waived by Lender, all proceeds from any disposition of the Collateral (for whatever reason) shall be held in trust for Lender and shall not be commingled with any other funds; provided however, this requirement shall not constitute consent by Lender to any sale or other disposition. Upon receipt, Grantor shall immediately delivery any such proceeds to Lender."

Trust, and there is no evidence that HRF sought or obtained such consent. There is also no evidence that the proceeds from the sale of the Malibu Property were held in trust for CBB or benefitted CBB in any way. The terms of the Commercial Security Agreement cited by plaintiff do not support a reasonable inference that HRF was foreclosing as CBB's agent.

CBB's signature on the substitution of trustee forms for Fidelity and Placer similarly does not support a reasonable inference that HRF was acting as CBB's agent in foreclosing. HRF's assignment of the Deed of Trust to CBB as collateral for the line of credit necessitated CBB's signature on the substitution of trustee forms, as those forms required the signature of the current beneficiary under the Deed of Trust. (See Civ. Code, § 2934a [substitution of trustee accomplished by beneficiary or its successor-in-interest].) CBB provided its signature on the substitution of trustee forms at HRF's request and as an accommodation to HRF. CBB's conduct was consistent with California law and with the terms of the loan it made to HRF; it was not consistent with the creation of an agency relationship between them.

Language in the notice of default directing plaintiff to contact CBB to arrange for payment or stop the foreclosure does not support a reasonable inference that HRF acted as CBB's agent in foreclosing. Such language is statutorily required by Civil Code section 2924c, subdivision (b)(1), which provides that a notice of default must identify the current beneficiary or mortgagee as the proper person to contact "[t]o find out the amount you must pay, or to arrange for payment to stop the foreclosure." Inclusion of such statutorily mandated language in the notice of default does not support a reasonable inference that an agency relationship existed between CBB and HRF.

Plaintiff concedes that his discovery responses, in which he claimed that HRF principal Joe Vanni told him that CBB had authorized HRF to speak on its behalf, and to handle the matter on behalf of CBB, are insufficient to establish an agency relationship between HRF and CBB. Plaintiff insists, however, that Vanni's statements are "part of the entire circumstantial background" supporting an inference of agency. Neither those statements, nor any of the other evidence cited by plaintiff, support such an inference.

Castillo v. Glenair, Inc. (2018) 23 Cal.App.5th 262 (*Castillo*) does not support plaintiff's argument that HRF acted as CBB's agent in foreclosing. Plaintiff cites the following language from that opinion as support for his contention that CBB's right to control the foreclosure proceedings under the terms of the Commercial Security Agreement was sufficient to establish an agency relationship with HRF: ""'"The significant test of an agency relationship is the principal's right to control the activities of the agent. [Citations.] It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent; the existence of the right establishes the relationship."'" [Citation.]" (*Id.* at p. 278.)

Plaintiff's reliance on the foregoing language is misplaced for two reasons. First, as discussed previously, CBB's right to control the foreclosure proceedings under the terms of the Commercial Security Agreement was contingent upon a default by HRF. Such a default did not occur. Second, *Castillo* is factually distinguishable from the instant case.

Castillo was a class action involving a temporary staffing company, GCA Services Group, Inc. (GCA), and its employees, the plaintiffs, who were paid to perform work onsite at Glenair, a GCA client. GCA authorized Glenair to record, review, and report the plaintiffs' time records to GCA, who then paid the

plaintiffs based on those time records. (*Castillo, supra*, 23 Cal.App.5th at p. 266.) The plaintiffs in *Castillo* sued Glenair for alleged wage and hour violations.

The plaintiffs in *Castillo* were also members of a separate class action brought against GCA for the same wage and hour claims, for the same work done, during the same time period as the claims asserted against Glenair. While the case against Glenair was pending, the action against GCA settled. The GCA settlement agreement barred settling class members from asserting wage and hour claims against GCA and its agents. (*Castillo, supra,* 23 Cal.App.5th at pp. 266-267.) Based on the GCA settlement, we held in *Castillo* that res judicata barred the plaintiffs' claims against Glenair as a matter of law because, among other reasons, Glenair was an agent of GCA and therefore a released party under the GCA settlement agreement. The undisputed evidence established such an agency relationship. GCA authorized Glenair to collect, review, and provide employee time records to GCA. Had Glenair failed to do so, GCA would not have been able to pay its employees. The undisputed evidence supported but a single inference -- that GCA required Glenair to perform the timekeeping-related tasks on behalf of GCA and as GCA's agent. (*Id.* at p. 282.)

Here, in contrast, the undisputed evidence shows that HRF foreclosed on its own behalf and not as CBB's agent.[3] HRF did not seek or obtain CBB's approval before recording the notice of default, before commencing foreclosure proceedings, issuing a

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[3] We reject plaintiff's argument, raised for the first time in his reply brief, that CBB was the "legal owner" of the Note and as such controlled the foreclosure process and how the foreclosure proceeds could be used. CBB, as a secured party, held a security interest in, and not legal title to, the Note and Deed of Trust. (Civ. Code, § 2888.)

notice of sale, or entering a bid at the foreclosure sale. HRF received some of the foreclosure proceeds, whereas CBB received none.

B. The statute of frauds bars any alleged oral agreement to modify the loan

A separate and independent ground for affirming the summary judgment is that the statute of frauds bars as a matter of law the alleged oral agreement that plaintiff contends excused his nonperformance under the Note and Deed of Trust.

An agreement that comes within the statute of frauds is invalid unless it is memorialized in writing and signed by the party to be charged with performance. (Civ. Code, § 1624; *Secrest v. Security National Mortgage Loan Trust* (2008) 167 Cal.App.4th 544, 552 (*Secrest*).) "An agreement to modify a contract that is subject to the statute of frauds is also subject to the statute of frauds. [Citations.]" (Civ. Code, § 1698; *Secrest, supra*, at p. 553.) A mortgage or deed of trust comes within the statute of frauds. (Civ. Code, § 1624, subd. (a); *Secrest,* at p. 552.) Absent a writing modifying the Malibu Loan, any claim based upon an oral contract to modify that loan is accordingly barred by the statute of frauds. (Civ. Code, § 1698.)

To avoid this result, plaintiff raises two arguments. The first argument, which was rejected by the trial court, is that memoranda sent by HRF to the escrow company in the refinancing transaction for the Tahoe Loan modified the Malibu Loan terms and satisfied the statute of frauds. The second argument, raised for the first time on appeal, is that CBB is estopped from asserting the statute of frauds.[4]

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[4] We do not consider a third argument, raised for the first time in plaintiff's reply brief, that the statute of frauds does not apply because the alleged oral agreement to modify the loan had

1. The memoranda do not satisfy the statute of frauds

A note or memorandum signed by the party to be charged may satisfy the statute of frauds. (*Sterling v. Taylor* (2007) 40 Cal.4th 757, 765-766 (*Sterling*).) "A memorandum satisfies the statute of frauds if it identifies the subject of the parties' agreement, shows that they made a contract, and states the essential contract terms with certainty. [Citations.]" (*Id.* at p. 766.) ""'What is essential depends on the agreement and its context and also on the subsequent conduct of the parties . . . ." [Citation.]' [Citation.]" (*Ibid.*)

We reject plaintiff's contention that two memoranda sent by HRF to Central Escrow in March 2012 in connection with the refinancing and payoff of the Tahoe Loan contain the essential terms of an agreement that both the Malibu Loan and the Tahoe Loan would be paid in full for $2,300,000.

The first memorandum, dated March 1, 2012, and signed by Joe Vanni states in relevant part: "PARK LOAN [¶] PARKA #7248 & 7361 [¶] THE PAYOFF ON THIS LOAN IS AS FOLLOWS; [¶] $2,300,000 [¶] THIS PAYOFF IS GOOD UNTIL 3-16-2012."

The second memorandum, dated March 21, 2012, is identical to the March 1 2012 memo, except that it extends the payoff date from March 16, 2012 to April 1, 2012 and specifies that the payoff is for the Tahoe Loan only: "THE PAYOFF ON THIS LOAN ON THE PARK AVE., S. LAKE TAHOE, CA PROPERTY IS; [¶] $2,300,000."

Neither memorandum, alone or together, meets the basic requirements necessary to satisfy the statute of frauds. Neither states the essential contract terms with reasonable certainty.

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already been performed. (*Sourcecorp, Inc. v. Shill* (2012) 206 Cal.App.4th 1054, 1061-1062, fn. 7.)

Although both the March 1, 2012 and March 21, 2012 memoranda identify two separate loan numbers, the March 1, 2012 memorandum mentions the payoff of only a single loan. The March 21, 2012 memorandum expressly limits the payoff to the Tahoe Loan and the Tahoe Property securing that loan. Neither memorandum refers to the Malibu Property. The essential terms of a purported agreement to pay off the Malibu Loan is not present. Neither memorandum satisfies the statute of frauds for that purpose. (*Sterling, supra,* 40 Cal.4th at p. 766.)

In his reply brief, plaintiff cites as additional evidence of email exchanges between HRF and Pacific City Bank, the lender with whom plaintiff refinanced the Tahoe Loan. None of these emails refer to the Malibu Loan or the Malibu Property. Consistent with the March 21, 2012 memorandum discussed above, a March 23, 2012 email from Vanni to Jodie Park, an officer at Pacific City Bank, refers to the "PARK LOANS" and states that "all liens on *this property* will be satisfied with the payoff of $2,300,000."[5] (Italics added.) References in the March 23, 2012 email communication to the consolidation of two, unspecified "smaller notes" and the combination of "2 loans," alone and together with the other written communications on

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[5] The March 23, 2012 email from Park to Vanni contains a subject line referencing the "PARK LOANS" and states: "Per our telephone discussion, this is to clarify the consolidation of the two smaller notes. There is nothing in writing regarding the combination of the 2 loans. Per verbal agreement between HRF and Solomon Aflalo, it was combined in February 2010 to simplify the two smaller loan statements into one statement. HRF has one statement for the $2mm loan and a separate statement for the two smaller loans. [¶] As per title, all liens on this property will be satisfied with the payoff of $2,300,000."

which plaintiff relies, do not establish an agreement to modify the Malibu loan that satisfies the statute of frauds.[6]

2. The doctrine of estoppel does not apply

"To estop a defendant from asserting the statute of frauds, a plaintiff must show unconscionable injury or unjust enrichment if the promise is not enforced. [Citation.] '"The doctrine of estoppel has been applied where an unconscionable injury would result from denying enforcement after one party has been induced to make a serious change of position in reliance on the contract or where unjust enrichment would result if a party who has received the benefits of the other's performance were allowed to invoke the statute."' [Citation.]" (*Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 944.)

"'"The elements of a promissory estoppel claim are '(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance."' [Citation.]" (*Aceves v. U.S. Bank N.A.* (2011) 192 Cal.App.4th 218, 225 (*Aceves*).)

In order to invoke the doctrine of estoppel to avoid the statute of frauds, a plaintiff must show more than an oral promise. He or she must also demonstrate a material change in position resulting in substantial hardship amounting to unconscionable injury. There must be extraordinary or unusual conduct by the promisee or circumstances that would result in gross injustice. (*Parker v. Solomon* (1959) 171 Cal.App.2d 125, 133.) The sort of material change in position that results in

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[6] During oral argument, plaintiff's counsel referred to a March 24, 2012 email as evidence of an oral agreement for a $2.3 million payoff of both the Malibu Loan and the Tahoe loan; however, the record on appeal contains no email communication of that date.

unconscionable injury is beyond the loss of the benefit of the bargain and requires more than the sorts of actions ordinarily undertaken in anticipation of entry into a contract. (*Irving Tier Co. v. Griffin* (1966) 244 Cal.App.2d 852, 865.) It is only where the promisee's change in position is material and the unconscionable injury substantial where the equitable doctrine of promissory estoppel will except an otherwise unenforceable oral contract from the statute of frauds. (See, e.g., *Aceves, supra*, 192 Cal.App.4th at pp. 227-230 [bank's oral promise to modify loan if borrower gave up pursuing relief in the bankruptcy court induced detrimental reliance by forfeiting the right to chapter 13 relief through which borrower may have avoided foreclosure and led to loss of borrower's property through foreclosure].)

There is no evidence in the record sufficient to establish, or to raise a triable issue of fact, that plaintiff detrimentally and materially changed his position or suffered an unconscionable injury in reliance on HRF's alleged oral promise to modify the Note and Deed of Trust so as to except that promise from the statute of frauds. Whether equitable estoppel applies in a given case is generally a question of fact, but it is a question of law when the facts are undisputed and only one reasonable conclusion can be drawn from them. (*Mt. Holyoke Homes, LP v. California Coastal Com.* (2008) 167 Cal.App.4th 830, 840.) The evidence shows that at the time of the alleged oral agreement, the outstanding balances on the Malibu and Tahoe Loans were $425,000 and $2,000,000, respectively. Based on HRF's alleged agreement to accept a discounted payoff on the Malibu Loan, plaintiff obtained a new loan from a different lender and directed that lender to pay $2,300,000 of the loan proceeds to HRF. The facts alleged demonstrate no material change in position resulting in substantial hardship or unconscionable injury to plaintiff. Rather, they show that plaintiff benefitted from an

alleged oral agreement in March 2012 to discount the amount owing under the Malibu Note by $125,000. HRF's foreclosure on the Property two years later does not constitute the unconscionable injury necessary to except the alleged oral modification of the loan terms from the statute of frauds. Plaintiff could have stopped the foreclosure by tendering the remaining balance of the contested debt and litigating his oral contract claim, but he did not do so. We reject plaintiff's contention, first raised on appeal, that summary judgment on the wrongful foreclosure claim should have been denied on the basis of promissory estoppel.

DISPOSITION

The judgment is affirmed. CBB is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT